Nos. 18-15144, 18-15166, 18-15255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,
Defendants-Appellants,

AND

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant,

AND

MARCH FOR LIFE EDUCATION DEFENSE FUND,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

SUPPLEMENTAL BRIEF FOR THE STATES OF CALIFORNIA, DELAWARE, MARYLAND, NEW YORK, VIRGINIA

MATTHEW P. DENN
Attorney General of Delaware
Attorney for the State of Delaware

BRIAN E. FROSH
Attorney General of Maryland
Attorney for the State of Maryland

BARBARA UNDERWOOD
Attorney General of New York
Attorney for the State of New York

MARK R. HERRING
Attorney General of Virginia
Attorney for the Commonwealth of Virginia

November 16, 2018

XAVIER BECERRA
Attorney General of California
Julie Weng-Gutierrez
Senior Assistant Attorney General
Kathleen Boergers
Supervising Deputy Attorney General
Karli Eisenberg
Deputy Attorney General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 210-7913
Karli.Eisenberg@doj.ca.gov
Attorneys for the State of California

(*Additional counsel on signature page*)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

On October 25, 2018, this Court ordered that the parties submit supplemental briefs addressing the following questions: (1) What is the status of the rules in question? (2) If they are now being reviewed by the Office of Management and Budget (OMB), when are they likely to be published in the Federal Register? (3) When the rules become final, will the present appeals become moot?

1. WHAT IS THE STATUS OF THE RULES IN QUESTION?

Both the final Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9940-F2) rule (RIN 0938-AT54) and the final Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9925-F) rule (RIN 0938-AT46) were published in the Federal Register on November 15, 2018.[1] These final rules will take effect on January 14, 2019.[2]

2. IF THEY ARE NOW BEING REVIEWED BY THE OFFICE OF MANAGEMENT AND BUDGET, WHEN ARE THEY LIKELY TO BE PUBLISHED IN THE FEDERAL REGISTER?

See above.

---

[1] *See* https://www.gpo.gov/fdsys/pkg/FR-2018-11-15/pdf/2018-24512.pdf?utm_campaign=subscription%20mailing%20list&utm_source=federalregister.gov&utm_medium=email (religious rule) and https://www.gpo.gov/fdsys/pkg/FR-2018-11-15/pdf/2018-24514.pdf?utm_campaign=subscription%20mailing%20list&utm_source=federalregister.gov&utm_medium=email (moral rule).

[2] *See* Dkt. 125 (religious rule) at A1; Dkt. 125 (moral rule) at A56.

3. WHEN THE RULES BECOME FINAL, WILL THE PRESENT APPEALS BECOME MOOT?

Yes. Any analysis of mootness turns on the particular circumstances in a given case. Under the specific circumstances here, the Court should dismiss the present appeals as moot when the final rules take effect, superseding the interim final rules, on January 14, 2019. These appeals address only the States' likelihood of success on their procedural challenge to the issuance of the interim final rules without notice and comment and their standing as to that procedural claim. But now, because the federal appellants issued the final rules, which will supersede the interim final rules in January, the States' specific procedural notice-and-comment claim as to the interim final rules—which is the only claim upon which the district court based the preliminary injunction under appeal here—will become moot. Because challenges to the merits of the final rules have not been addressed in the first instance by the district court, this Court should remand to the district court for further proceedings.

a. This Court "determine[s] [a] question of mootness in light of the present circumstances where injunctions are involved." *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996) (citing *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)). Where the facts and circumstances supporting an injunction application have changed, this Court takes those changes into account. *See Sawyer v. Pioneer Mill Co.*, 300 F.2d 200 (9th Cir. 1962).

As a general matter, an appeal may become moot as a result of changes to the underlying law at issue in the appeal. *See, e.g.*, *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15 (1972); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011); *Maldonado v. Morales*, 556 F.3d 1037, 1042 (9th Cir. 2009). For example, this Court has explained that "[o]ffering an advisory opinion construing a statute that is not before [the Court] in order to grasp at a finding of a live controversy embodies obvious and fundamental inconsistences, and is contrary to the case or controversy requirement." *Matter of Bunker Ltd. P'ship*, 820 F.2d 308, 313 (9th Cir. 1987).

In the administrative context, a subsequent rulemaking that supersedes a challenged regulation or rule can make a challenge to the prior regulation or rule moot. *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 472 (D.C. Cir. 2014).[3] For instance, in *NRDC v. U.S. Nuclear Regulatory Comm'n*, the D.C. Circuit concluded that appellant's notice and comment challenge was moot where, during the pendency of the appeal, the federal agency sought comments on the proposed rule and issued a final rule. 680 F.2d 810, 813-14 (D.C. Cir. 1982). The

[3] *Cf. Princeton Univ. v. Schmid*, 455 U.S. 100, 101 (1982) (First Amendment challenge to a prior set of university regulations governing on-campus speech was mooted when the university substantially amended those regulations); *Bullfrog Films, Inc. v. Wick*, 959 F.2d 779, 780 (9th Cir. 1992) (where interim regulations were supplanted by new legislation, the appeal was moot).

Court explained that it "lack[ed] jurisdiction to pass upon a question in the absence of a 'justiciable' controversy" because the question sought to be adjudicated had been mooted by subsequent developments. *Id.* at 813-14; *see also Ass'n of Am. Physicians & Surgeons*, 746 F.3d at 472 (agreeing with the government that adoption of the final rule "clearly moot[s] appellants' procedural claim").[4]

In this case, federal appellants' issuance of the final religious and final moral exemption rules will render the pending appeals from the district court's order granting a preliminary injunction moot once the new rules take effect on January 14, 2019. The district court's preliminary injunction was based on the conclusion that the States were likely to prevail on their procedural claim—that the interim final rules are invalid because they were adopted without notice and comment. With the issuance of the final rules, which will supersede the interim final rules, the procedural claim underlying the preliminary injunction and these appeals will become moot on January 14, 2019.

b. The Court should dismiss the appeals as moot and remand to the district court for further proceedings. That would allow the district court to address the

[4] *See also Gulf of Maine Fisherman's Alliance v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (explaining that "promulgation of new regulations and amendment of old regulations are among such intervening events as can moot a challenge to the regulation in its original form"); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980) (case can be mooted by amendment of regulations or promulgation of new regulations).

outstanding, substantive issues not addressed in its preliminary injunction order, as well as any new claims or issues arising from the final rules. *See Bullfrog Films*, 959 F.2d at 781 ("declin[ing] to issue an opinion" on an issue that resulted after the subject interim regulations were supplanted); *Arc of California v. Douglas*, 757 F.3d 975, 979 (9th Cir. 2014) (concluding that the court could not determine the propriety of injunctive relief where the primary statute appellant challenged expired while the case was on appeal and the additional claims asserted in the district court were "not the focus of the preliminary injunction proceeding").[5]

Appellant Little Sisters argues that even if the final rules are issued, this Court should reach both the "question of standing" and the substantive "merits" of the religious rule. Dkt. # 116 at 1. But the district court's preliminary injunction order and the briefing in this Court have focused on the States' procedural injury and the States' procedural claim—not the substantive merits of the interim rules. ER 13, 17-24; Dkt. # 48 at 20-22, 32-53. As in *Bullfrog Films* and *ARC*, this Court should decline to issue an advisory opinion on matters not ruled upon by the district court

[5] Specifically, the complaint alleged that the interim final rules (IFRs) were invalid under the APA because (1) the IFRs contravene the statutory provisions they purport to implement and are therefore contrary to law and arbitrary and capricious, and (2) the agencies failed to provide any reasoned explanation for their reversal in policy. ER 278-279. The complaint also alleged causes of action under the Equal Protection Clause and the Establishment Clause. ER 279-280.

and not fully briefed or argued by the parties on appeal. Rather, this Court should remand to the district court for initial consideration. *Bullfrog Films*, 959 F.2d at 780; *Arc*, 757 F.3d at 979.[6]

Little Sisters' reliance on *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), is misplaced. Dkt. # 116. Although *Burwell* involved two appeals from preliminary injunction orders, in both cases the injunctions were based on the merits of plaintiffs' substantive claims.[7] Thus, despite the subsequent administrative rule changes, the substantive claims were properly before the Court and had not been mooted by the administrative developments. In contrast, here, the preliminary injunction order, including its decision with regard to standing, is

[6] The underlying case—separate from the pending appeals—is not moot. *See Bauer v. Devos*, 325 F. Supp. 3d 74, 92-93 (D.D.C. 2018) (declaratory relief not moot where the district court can address the outstanding substantive claims); *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). To the extent any substantive or procedural deficiencies remain in the final rules, the States anticipate that they will amend their complaint. *See Ass'n of Am. Physicians & Surgeons*, 746 F.3d at 473 (explaining that even if "'substantive defects' carry over from the IFR . . . it is clearly preferable as a general matter to review a set of claims in the context of an extant rather than a defunct rule").

[7] *See* 134 S. Ct. at 2765 (explaining that the Third Circuit affirmed the denial of injunctive relief because for-profit, secular corporations cannot engage in religious exercise within the meaning of the Religious Freedom Restoration Act (RFRA) or the First Amendment); *id*. at 2766 (explaining that the Tenth Circuit granted a preliminary injunction, concluding that for-profit businesses are "persons" within the meaning of RFRA and that plaintiffs had established a likelihood of success on their RFRA claim and demonstrated irreparable harm).

exclusively focused on the States' procedural claims challenging only the interim final rules.

CONCLUSION

When the final rules become effective, this Court should dismiss the pending appeals as moot and remand to the district court for further proceedings.

Dated: November 16, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
Julie Weng-Gutierrez
Senior Assistant Attorney General
Kathleen Boergers
Supervising Deputy Attorney General
/s Karli Eisenberg
Karli Eisenberg
Deputy Attorney General
1300 I Street
Sacramento, CA 94244-2550
(916) 210 7913
Attorneys for the State of California

BRIAN E. FROSH
Attorney General of Maryland
Carolyn A. Quattrocki
Deputy Attorney General
Steven M. Sullivan
Solicitor General
Kimberly S. Cammarata
Director, Health Education & Advocacy
200 St. Paul Place
Baltimore, MD 21202
(410) 576 7038
Attorneys for the State of Maryland

MARK R. HERRING
Attorney General of Virginia
Samuel T. Towell
Deputy Attorney General
202 N. Ninth St.
Richmond, VA 23219
(804) 786 6731
Attorneys for the Commonwealth of Virginia

MATTHEW P. DENN
Attorney General of Delaware
Ilona Kirshon
Deputy State Solicitor
Jessica M. Willey
David J. Lyons
Deputy Attorneys General
820 N. French St.
Wilmington, DE 19801
(302) 674 7387
Attorneys for the State of Delaware

BARBARA D. UNDERWOOD
Attorney General of New York
Steven C. Wu
Deputy Solicitor General
Ester Murdukhayeva
Assistant Solicitor General
Lisa Landau
Bureau Chief, Health Care Bureau
Sara Haviva Mark
Special Counsel
Elizabeth Chesler
Assistant Attorney General
28 Liberty St.
New York, NY 10005
(212) 416 6312
Attorneys for the State of New York

CERTIFICATE OF SERVICE

I certify that on November 16, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that services will be accomplished by the appellate EM/EC system.

Date: November 16, 2018 *s/Karli Eisenberg*

SA2018100331
13333543.docx